

NO. 47079-9-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JAMES J. WHITE,

Appellant,

v.

CITY OF LAKEWOOD,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Despite its convoluted history of records requests, failures to properly respond, and lengthy litigation, the questions posed in this appeal can be solved by simple applications of past precedent and adherence to the drafter's intent in enacting our Public Records Act. RCW 42.56 *et. seq.*

Mr. White is an experienced criminal defense and civil rights attorney who, in conducting an investigation for a prospective client, made three public records requests to the City of Lakewood. The City denied the first request, claiming the open investigations exemption. Mr. White clarified and resubmitted his request, not once, but twice. The City responded with a partial production of records to the second request, and with a second open investigation withholding to the third.

Mr. White retained counsel and filed this action. After extensive discovery, in which requested documents were still not turned over, the parties ended up before the trial court on dispositive cross-motions. The City argued that any claims related to the first two requests were time-barred, based on the dates of the City's response letters. Mr. White argued: (1) that the City had failed to trigger the statute of limitations because its claims of exemptions were insufficient under *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, and (2) that the statute of

limitations could not be calculated based on the date of a letter, when the City admitted the letter was likely mailed after such date. 165 Wn. 2d 525, 199 P.3d 393 (2009) (hereinafter *RHA v. Des Moines*).

The trial court declined to examine the claims of exemptions for sufficiency prior to ruling on the statute of limitations claims. Based on the dates of the City's letters, the court dismissed as time-barred the claims stemming from the first two requests. For the third request, the court found that the City had engaged in "simple neglect" of its duties under the PRA and imposed a \$10 per day sanction, without engaging in the thorough analysis required by *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 229 P.3d 735 (2010)(hereinafter *Yousoufian 2010*)

This appeal presents this Court with the opportunity to correct the trial court's mistakes and to ensure that public agencies cannot escape the responsibility for violating their duty to disclose records under the PRA.

## II. ASSIGNMENT OF ERROR

**Assignment of Error:** The trial court erred in issuing the *Finding of Fact and Conclusions of Law and Judgment & Order on Cross-Motions for Summary Judgment* entered on December 16, 2014. CP 399-407.

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**Issues Pertaining to Assignment of Error:**

A. Whether the trial court erred by deciding which statute of limitations was applicable to Mr. White’s first and second PRA requests without ever examining the sufficiency of the City’s withholding letters?

B. Whether the trial court erred in calculating the statute of limitations’ expiration based on the drafting date of the City’s letter, instead of its mailing or receipt dates?

C. Whether the trial court erred in failing to find that the City violated the PRA for the first two requests, in failing to order the production of records that remain outstanding, and in failing to impose penalties?

D. Whether the trial court abused its discretion in imposing a \$10 per day sanction for the third request?

E. Whether Mr. White is entitled to attorney’s fees and costs for this appeal?

**III. STATEMENT OF THE CASE**

**A. Underlying Investigation**

In early 2012, Lakewood Police Officer Shawn Noble recruited a confidential informant (“CI”) to assist with his investigations, generating the first in a large variety of records tied to his investigation. CP 140, 142-143, 153-154, 166-167, 264-266, 295. On May 16th and 17th of 2012, the

CI allegedly met with Officer Noble and then, at Noble's direction, purchased cocaine from some apartments at 5314 San Francisco Ave SW, in Lakewood. This activity was reflected in the CI File and police incident reports. CP 137-143. As Officer Noble continued to investigate this matter, he created a paper investigative file in which he placed print outs, reports, criminal history information and photographs related to his investigation. CP 153-156.

On May 18, 2012, Noble presented two search warrant applications and supporting affidavits to Judge Katherine Stolz, who granted both warrants. CP 44-46. Noble kept drafts of the search warrant applications/affadavits on his computer, where they should remain to this day. CP 159. In preparing to serve the warrants, Officer Noble sent a number of emails to other law enforcement resources about the upcoming warrant service. CP 113-120. When Lakewood Police executed the warrants on May 24, 2012, they called in to police dispatch, creating a computer log of their actions. CP 170-171. Three grams of marijuana and a few smoking pipes were seized during the warrants' service, and no arrests were made. CP 86-95. Officer Noble logged the property seized and completed returns of service for the warrants. CP 47-48, 55-56.

Officer Noble wrote up reports on this warrant service, but did no further follow-up investigation. CP 161. No investigative actions were

taken on the matter until Officer Noble's abrupt departure from the Lakewood Police Department ("Department") on August 9, 2012. CP 128, 161. The case was not reassigned to another investigator after Noble left. The case was left dormant but remained listed as "active" in the Department's computer system. CP 121-123.

The plaintiff/appellant in this matter, James White, is an experienced defense and civil rights attorney. CP 254. Shortly after the search warrants were executed, Mr. White was contacted by a client who felt his civil rights were violated by the Department during the warrant service. CP 254. Mr. White began to investigate the incident, including through the submission of public records requests to the City of Lakewood. CP 254.

## **B. The Records Requests**

### **1. The First Request**

On June 26, 2012, Mr. White submitted a public records request to the City of Lakewood, asking for documents for "case #'s 12-145-0155/12-145-0156" and additionally stating that he "would like to view any documents pertaining to search warrant for the property at 5314 San Francisco Ave SW #1 & any lists or inventory of items recovered." CP 303. The City responded on June 27th, stating that it needed additional time to gather records. CP 70.

The request was then forwarded to the lieutenant in charge of public records for the Department, Lt. Hoffman. CP 186-189. On July 2, 2012, she entered the case numbers into the Department's computer system<sup>1</sup>, saw that the case was listed as "active," and wrote "ACTV Do Not Release." CP 69, 186-189. The whole process took about 30 seconds. CP 207.

On July 3, a city paralegal, Ann-Marie Evans, drafted a letter to Mr. White, denying the production of the requested records on the ground that their release "could interfere with the active investigation." CP 68. The letter did not include any identification of the documents being withheld or any explanation of how the release of documents would interfere with any investigation. CP 68. At that time, more than a month had passed since any investigative activity had taken place. CP 161. No one attempted to contact the investigating detective or tried in any way to preserve the investigative file for future review. CP 161, 166, 184-186, 220-221. Because of the failure to preserve the investigative file, there is no way to know the full extent of the records withheld with regard to this first request.

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<sup>1</sup> It is the individual investigating officer's responsibility to maintain the correct status in this system, but this responsibility is often ignored and the system is not updated. CP 182, 263-264, 276, 281. No policy mandates that officers keep this system updated. CP 184.

## **2. The Second Request**

In another attempt to get documents, Mr. White resubmitted his request for records on July 27, 2012. CP 305. In addition to re-requesting all the same records, Mr. White this time also specifically requested “emails/communications/reports pertaining to the search of 5314 San Francisco Ave SW #1.” He also noted “this is an ongoing request” at the top, to remind City officials that he had asked for the records before. CP 305. The city responded on June 31<sup>st</sup>, stating that it needed additional time to gather records. CP 104.

On August 27, 2012, Lieutenant Hoffman again entered the case numbers into the department’s computer system and saw that the case numbers were listed as “active.” This time she emailed the city paralegal, telling her “both of the reports requested under PDR 12-597 are ACTIVE and cannot be released.” CP 99-101, 121-123. Something triggered Lt. Hoffman to reexamine the request, and she sent a second email stating, “Ooops. The detective is Shawn Noble. Now what?” CP 122. Hoffman’s concern stemmed from the fact that she now knew this was not an active investigation as Noble had left the Department on August 9, 2012. *See* CP 128. Based on this confusion, the City sought a second extension in a letter dated that same day. CP 98.

In a letter dated September 5, 2012 and accompanied by ten pages of police report records, the City stated that it had “released the portion of the record which are not exempt from disclosure by RCW 42.56 and/or other statutes.” CP 74-84. The City did not provide the expressly requested emails, communications, or related records, nor an exemption log claiming any of these records to be exempt. CP 74. The paralegal who mailed this production of records was not sure when it was mailed, but acknowledged that it likely went out on September 6<sup>th</sup>, and that she had no method for tracking its delivery. CP 233-234. The packet was likely received by Mr. White either on Friday, September 7<sup>th</sup> or Monday the 10<sup>th</sup>. CP 300. The letter’s closing paragraph stated that Mr. White’s “request for public records will be considered closed unless you respond to the contrary by October 5, 2012.” CP 74.

### **3. The Third Request**

Noting the unexplained absence of most of the requested records and following the prompt in the previous letter, Mr. White sent the City a follow-up fax on September 24, 2012. CP 307. This third request again noted it was an “ongoing request”, listed the case numbers, and re-requested access to “search warrants,” other “information,” and the “documents provided to Judge Stolz” with reference to the search. CP 307.

The City responded by letter dated September 25<sup>th</sup>, stating that it needed additional time to gather records. CP 110.

On October 1, 2012, Lieutenant Hoffman again likely checked the computer, and wrote “ACTV cannot be released” on the request, returning it to the City paralegal. CP 109, 201-202. Looking no further, Ms. Gorash, the paralegal, drafted a letter to Mr. White, denying the production of the requested records because their release “could interfere with the active investigation.” CP 108. The letter again did not identify the documents being withheld nor explained how the release of documents would interfere with an investigation, which after all was dormant. CP 108.

At that time, more than four months had passed since any investigation took place and nearly two months had elapsed since the assigned detective had left the Department. The case had not been assigned to another detective.

### **C. Procedural History of This Case**

As a result of the City’s failure to provide the requested records, Mr. White was unable to properly evaluate his potential client’s claims. He eventually lost contact with the client and lost his business. CP 301. In summer of 2013, Mr. White was reminded of his three unsuccessful records requests as he heard stories of the City suppressing other

unfavorable documents in civil rights litigation. CP 301. Mr. White retained counsel and this matter was filed in Pierce County Superior Court and served on September 6th, 2013. CP 1-8.

In the months following the filing of this case the City provided Mr. White numerous previously withheld records, including search warrants, complaints/affidavits for the search warrants, returns of service, property reports, eight pages of Officer Noble's emails to other law enforcement resources related to the searches in question, and reports related to the alleged CI purchases of narcotics, which supported the issuance of the warrants at issue in this matter. CP 40-56, 58-125, 137-143.

To date, no CI information card or file, nor any exemption log for its withholding, was produced. CP 38. No portion of the paper investigative file has ever been produced. CP 38. The City also failed to produce the communications records and computer aided dispatch logs related to the warrant service.<sup>2</sup> CP 38. In the fall of 2014, the parties to this action filed dispositive cross-motions with the trial court. CP 14-34, 308-329, 372-392, 393-398. In its motion to dismiss the City argued, *inter alia*, that Mr. White's claims related to the first two requests were time-barred pursuant to RCW 42.56.550(6). Mr. White argued that the City had

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<sup>2</sup> The computer aided dispatch logs were provided to Mr. White's counsel in response to a separate public records request made to South Sound 911 in 2014. CP 37.

failed to trigger the statute of limitations because its claims of exemption were insufficient under *RHA v. Des Moines*. Additionally, with regard to the second request, Mr. White argued that the statute of limitations could not be calculated based on the date of the City's September 5, 2012 letter, as he had clearly not received the letter, and could not have received the letter, on the day it was drafted, when City staff had admitted they likely did not mail the letter out on that date. The trial court refused to follow *RHA v. Des Moines* and chose not to examine the City's exemption claims for sufficiency prior to ruling on the City's statute of limitations claims. RP 17-19. The court summarily dismissed the claims stemming from the first two requests as time-barred based *solely* on the pre-mailing dates of the City's letters. RP 17-19. For the third request, the trial court found that the City had neglected its duties under the PRA and imposed a \$10 per day sanction, without engaging in the analysis required by *Yousoufian 2010*. RP 27. Contrary to the evidence of the City's ongoing violations and repeated failure to perform even simple investigation which would help protect the public's right to inspect documents, the trial court concluded that the City's negligence was "simple," thereby placing the City's violation at the low end of the statutory range. This Court has the opportunity to correct the trial court's mistakes in this case.

More importantly, this appeal allows this Court to ensure that public agencies do not evade their duties under the PRA by ignoring the mandates of our Court of Appeal and through the charade of triggering statutes of limitations by the mere drafting (and not mailing) of insufficient exemption letters.

#### **IV. ARGUMENT**

Four primary questions are presented within this appeal: (1) whether the City's withholding letters for the first two requests were sufficient to trigger the one year statute of limitations, (2) whether the statute of limitations is triggered by the date typed atop the City's letter, if such date predates the date of mailing and receipt of the letter, (3) whether the trial court erred in not granting Mr. White's motion to order the production of documents and impose daily penalties for the first and second requests, and (4) whether the trial court erred in imposing a \$10 per day sanction for the third request. Linked to those is the secondary question of whether Mr. White is entitled to attorney's fees or costs for this appeal.

##### **A. Standard of Review Under the PRA**

The PRA is a strongly worded mandate for broad disclosure of public records. *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). "The people, in delegating authority, do not give their public

servants the right to decide what is good for the people to know and what is not good for them to know.” RCW 42.56.030.

Washington’s PRA requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. *O’Connor v. Dep’t of Social and Health Services*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). The PRA requirement of disclosure is broadly construed and its exemptions are narrowly construed to implement this purpose. RCW 42.56.030; *Cowles Publ’g Co. v. Spokane Police Dep’t*, 139 Wn.2d 472, 476, 987 P.2d 620 (1999). Strict compliance with the public records is mandatory, and administrative inconvenience or difficulty for the agency cannot excuse failures to comply with the PRA. *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wn. 2d 525, 535, 199 P.3d 393, 398 (2009) (citing *Zink v. City of Mesa*, 140 Wn.App. 328, 337, 166 P.3d 738 (2007)).

The purpose of the PRA is to ensure the speedy disclosure of public records. *Spokane Research & Defense Fund v. City of Spokane (Spokane Research III)*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *rev’d on other grounds*, 155 Wn.2d 89 (2005). The statute sets forth the procedure to achieve this. Upon the motion of any person having been denied an opportunity to inspect or copy a public record, the superior court may require the agency to show cause why it has refused to allow

inspection or copying of a specific public record or class of records. RCW 42.56.550(1). “[S]how cause hearings are the usual method of resolving litigation under [the PRA].” *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003). The burden of proof is on the agency to establish that the refusal is in accordance with a statute that exempts or prohibits disclosure. RCW 42.56.550(1); *Sargent v. Seattle Police Dep’t*, 179 Wn. 2d 376, 385-86, 314 P.3d 1093, 1097 (2013).

Pursuant to RCW 42.56.550(3) “[t]he court may conduct a hearing based solely on affidavits” in a PRA case. *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010). The Supreme Court has stated that the PRA contemplates judicial review upon motion and affidavit, for to do otherwise ““would make public disclosure act cases so expensive that citizens could not use the act for its intended purpose.”” *Id.* (quoting *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 801, 791 P.2d 526 (1990)).

Appellate court review of agency action under the PRA and the court opinions below is *de novo*. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn. 2d 515, 522, 326 P.3d 688, 692 (2014); *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn. 2d 30, 35-36, 769 P.2d 283, 284 (1989); *Progressive Animal Welfare Soc’y (PAWS) v. Univ. of Wn.*, 125 Wn.2d 243, 252–53, 884 P.2d 592 (1994); *Dragonslayer, Inc.*

*v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 441-42, 161 P.3d 428, 431-32 (2007). This Court is not bound by the trial court's factual findings and stands in the shoes of the trial court where, as here, the record consists only of declarations, memoranda, and other documentary evidence. *Koenig v. Thurston County*, 175 Wn.2d 837, 842, 287 P.3d 523 (2012), citing *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

**B. The Trial Court Erred in Ruling That The Statute of Limitations Barred Mr. White's Claims**

Mr. White's first two requests were not time-barred. In dismissing these claims, the trial court erred in two distinct ways: (1) the court failed to consider the sufficiency of the City's exemption logs in deciding which statute of limitations applied, and (2) for the second request it incorrectly calculated statute of limitations time period based on the *drafting* date on the City's letter, without considering when Mr. White was actually notified that he had a claim.

In construing the PRA, including the statute of limitations sections located within it, courts are directed to look at the Act in its entirety in order to enforce the law's overall purpose. *See Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wn.App. 212, 217, 6 P.3d 1214 (2000); *RHA v. Des Moines*, 165 Wn. 2d 525, 536, 199 P.3d 393,

398 (2009). Courts have emphasized that “[t]he PRA is a strongly worded mandate for broad disclosure of public records,” and the statute of limitations therein is to be interpreted with this strong mandate in mind. *RHA v. Des Moines*, 165 Wn. 2d at 535 (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)).

The trial court incorrectly decided that Mr. White’s action with regard to the first and second requests was barred by RCW 42.56.550(6), which states that actions “must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” In doing so, the trial court followed the City’s specious reliance on the “plain language” of the statute and ignored the guidance and interpretation provided by the Courts of Appeal and Supreme Court. Neither of the requests was time-barred.

**1. The City’s Exemptions Logs Were Insufficient to Trigger the Statute of Limitations**

As was noted above, RCW 42.56.550(6), states that actions “must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” The Washington Supreme Court has held that in order to trigger this statute of limitations any claim of exemption must be accompanied by a sufficient privilege or exemption log. *RHA v. Des Moines*, 165 Wn. 2d at 540-41. A sufficient log contains “the sort of identifying information that would be deemed

adequate for review purposes under the PRA,” namely “the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.” *Id.*, at 538 (quoting *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn. 2d 243, 271, 884 P.2d 592, 608 (1994)(*PAWS II*). For situations where the identification of specific records may reveal protected information, an “agency may designate the records by a numbered sequence.” *Id.* Additionally, to trigger the statutes of limitations, the log must contain a brief explanation of how the exemption applies to each document withheld. *See Sanders v. State*, 169 Wn. 2d 827, 846, 240 P.3d 120, 130 (2010); *City of Lakewood v. Koenig*, 182 Wn. 2d 87, 94, 343 P.3d 335, 338 (2014). Such an exemption log is required to trigger the limitations period in RCW 42.56.550(6). *Sanders v. State*, 169 Wn. 2d at 846; *RHA v. Des Moines*, 165 Wn. 2d at 538.

A key reason for this strict requirement is that “exemptions cannot be vetted for validity if they are unexplained” and the log is necessary to provide requestors with “the opportunity for meaningful judicial review of a claim of exemption.” *Id.* “Without the information a privilege log provides, a public citizen and a reviewing court cannot know (1) what individual records are being withheld, (2) which exemptions are being

claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record.” *RHA v. Des Moines*, 165 Wn. 2d at 540. As a result, a claim of exemption lacking these required items fails to trigger the requestor’s duty to file a lawsuit within one year. *Id.* Where RCW 42.56.550’s one-year limitation does not apply, the statute of limitations reverts to the “catch-all” two-year statute of limitations. RCW 4.16.130.

The Supreme Court’s explanation of this principle was presented to an incredulous trial court in this case. RP at 17-19. Yet the trial court refused to examine the sufficiency of the City’s exemption logs in deciding to dismiss Mr. White’s claims. RP at 17-19.

**a. The Exemption Log for the First Request Was Insufficient**

The City’s attempt to claim an exemption for the first request clearly failed to meet the standard set forth above. In response to Mr. White’s request, the City responded with a letter stating, in relevant part:

The investigation in regards to this incident is ongoing and the requested records are currently exempt from disclosure pursuant to RCW 10.97.070(2) and RCW 42.56.240. At this time it has been determined that the release of these records could interfere with the active investigation.  
CP 68.

The City did not identify what records were being withheld or how the statutory exemptions might apply to the withheld records. Such

response therefore did not trigger the one-year statute of limitations in RCW 42.56.550(6).

Rather than informing Mr. White “with particularity of the specific record or information being withheld and the specific exemption authorizing the withholding,” the City merely issued a blanket statement of denial, without identifying any documents. *City of Lakewood v. Koenig*, 182 Wn. 2d at 94-95.

One of the exemptions the City wrongfully invoked here allows agencies to withhold “specific intelligence information and specific investigative records... the nondisclosure of which is essential to effective law enforcement.” RCW 42.56.240(1). This exemption has been interpreted to cover the contents of open investigatory files in certain circumstances. *Newman v. King Cnty.*, 133 Wn. 2d 565, 574, 947 P.2d 712, 716 (1997). While a log sufficient to meet the requirements of this categorical investigative exemption may not require the same level of stringency as is required by other exemptions, a claim of exemption must nonetheless “provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper.” *RHA v. Des Moines*, 165 Wn. 2d at 539.

It follows that in invoking the categorical investigative exemption, the City was at very least obligated to provide sufficient information to

allow the requestor, Mr. White, to determine whether the file contained “specific intelligence information and specific investigative records” whose non-disclosure was “essential to effective law enforcement,” RCW 42.56.240(1), or whether it contained something else entirely. The types of documents being withheld, at a minimum, should have been identified in some form in the exemption log. Only a specific enough identification of the variety of withheld records would have allowed Mr. White to challenge the withholding, if the withheld items could not have been claimed as “specific investigative records,”<sup>3</sup> and thus would not be exempted under RCW 42.56.240(1). Similar information would also have been helpful in determining how the City thought RCW 10.97.070(2) might apply to the records being withheld.

The City chose not to provide any such information, frustrating “the very purpose of the PRA to achieve broad public access to agency records” and denying Plaintiff “the opportunity for meaningful judicial review of a claim of exemption” to which he is entitled. *RHA v. Des Moines*, 165 Wn. 2d at 540-41.

Had the trial court examined the City’s exemption letter for the first request, as required under *RHA v. Des Moines*, it would have found

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<sup>3</sup> The case investigative file may fit this mold, but radio communications logs, warrants already filed with the court and warrant returns are clearly not part of protected investigative file, regardless of investigation status.

that the letter contained no information about what records were being withheld or about how the exemptions allegedly might apply to the withheld records. Such findings would have compelled the court to conclude that the one-year statute of limitations was not triggered by the City's response to this initial request.

**b. The Exemption Log for the Second Request Was Also Insufficient**

The City's response to the second request for records included a partial production of records and a second insufficient claim of exemption. The City's second letter claimed that "personal identification information was redacted pursuant to RCW 42.56.050, 42.56.230 and 42.56.590."

This claim of exemption is nearly identical to that which the Supreme Court ruled insufficient in *City of Lakewood v. Koenig*. In that case, the Court found that the City's statement -- that redactions of drivers license numbers "[we]re made pursuant to RCW 42.56.050, RCW 42.56.240, RCW 46.52.120, and RCW 46.52.130" -- did not meet the standard outlined in *RHA v. Des Moines*, and "was improper under the PRA." *City of Lakewood v. Koenig*, 182 Wn. 2d at 91-95. As the claim of exemption was insufficient, it could not, and did not, trigger the one-year statute of limitations.

**2. Courts Cannot Rely on the *Drafting Date* of the City’s Letter to Calculate the Statute of Limitations for a PRA Request**

At the trial court, the City argued that the insufficiency of the exemption log in its letter dated September 5, 2012 (responding to the second request) was irrelevant, because that response also included a production of records.<sup>4</sup> The mailing date of this letter was in debate, but the trial court found that Mr. White received it on or after September 7, 2012, perhaps as late as September 10<sup>th</sup>. CP 401. Given these findings of fact, the trial court erred when it concluded that the statute of limitations for this request had expired on September 6, 2013, the date this action was filed and served.

**a. Reliance on the Letter’s Drafting Date Shifts the Burden for an Affirmative Defense**

The City’s statute of limitations argument for dismissal of claims stemming from Mr. White’s requests was an affirmative defense. Accordingly, the City should have been required to meet its burden of proof in order to prevail. CR 8(c); *Haslund v. City of Seattle*, 86 Wn.2d 607, 620–21, 547 P.2d 1221 (1976).

Alas, when the mailing date of the letter was disputed and no evidence supported that the letter was mailed on September 5, 2012, the trial court did not require the City to meet its burden in regard to this

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<sup>4</sup> The records produced with the insufficient exemption letter dated September 5, 2012 were the sole records ever produced as a result of Mr. White’s three requests.

defense. Because the City did not meet its burden, the court improperly granted the City's motion to dismiss based on this drafting date.

**b. A PRA Response Triggers the Statute of Limitations On the Date on Which It Is Received By, Or At Minimum, Transmitted To, The Requestor**

It is absurd to contend that the statute of limitations is triggered by the *drafting* of a letter of exemption or letter that accompanies a production of records. As noted above, *RHA v. Des Moines* explains that for the statute of limitations to be triggered, the requestor must be provided with a sufficient explanation of an exemption to notify him of the basis for withholding. It rationally follows that the statute of limitations is not triggered until such a claim is *received by*, or at very minimum transmitted to, the requestor. In other words, to trigger the statute, the City must make its claim of exemption (or produce records) and *actually transmit* the exemption, records, or both. Without the transmission and receipt, it is impossible for the requestor to have notice of any potential for a claim.

In applying the statute of limitations to PRA actions, courts have previously concluded that the statute is not triggered until the requestor receives the production of records in question. *See Johnson v. State Department of Corrections*, 164 Wn. App. 769, 265 P.3d 216 (2011). The Court in *Johnson* ruled that Johnson failed to timely file his

action because the “latest possible date on which Johnson’s single-document action accrued was September 3, 2007,” one week after the DOC mailed its August 27, 2007 letter to Johnson explaining there were no additional documents and closing his request. *Id.* at 778-779. The additional week was to allow for the “reasonable time by which Johnson should have received that letter.” *Id.*

Here, the City drafted and dated its letter on September 5, 2012. The paralegal who wrote and sent the letter (with partial production of records) was not sure when the letter was mailed, acknowledged the likelihood that it did not go out until September 6, and had no method for tracking its delivery. CP 243-244.

Rationally extending *RHA v. Des Moines*, and following *Johnson*, the time to file this action would have expired one year after the letter was mailed, plus a week of reasonable time for White to receive the letter -- thus on/about September 12 or September 13, 2013. Yet the trial court ruled that such time expired on September 5, 2013, although it is undisputed that the City, the party with the burden on this issue, failed to show that Mr. White was provided records or a claim of exemption on September 5, 2012. Accordingly, the trial court erred in finding that the statute of limitations had already expired on September 6, 2013.

Additionally, reliance on a date *written on* a letter that is not transmitted -- until later, if ever -- to trigger the statute of limitations would create an absurd result. Were this allowed, agencies could draft letters with exemptions or productions of records, thereby triggering the clock for filing an action -- without transmitting anything to the requestor. Such patently absurd interpretation must be rejected: courts must “avoid readings [of the PRA’s statute of limitations] that lead to absurd results.” *Bartz v. State Dep’t of Corr. Pub. Disclosure Unit*, 173 Wn. App. 522, 538, 297 P.3d 737, 744 (2013) *review denied* 177 Wn. 2d 1024, 309 P.3d 504 (2013), *citing Cannon v. Dep’t of Licensing*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

In short, the drafting date of the City’s letter cannot be the trigger for Mr. White’s time to file an action. That clock only begins ticking when the exemption or production is transmitted to, and received by, the requestor. In this case, for the second request, time for the statute of limitations did not begin to run until September 7<sup>th</sup>, at the earliest. Thus, Mr. White’s filing on September 6, 2013 was timely, regardless of the sufficiency of the exemption logs provided by the City.

**C. As The First And Second Requests Were Not Time-Barred, The Trial Court Should Have Granted Mr. White’s Motion to Show Cause**

As the trial court erred in ruling that Mr. White's first two requests were time-barred, it also erred in failing to grant Mr. White's motion to show cause with reference to those requests. The trial court should have granted Mr. White's motion, ordering the City to produce the remaining outstanding records and imposing appropriate daily penalties for each category of wrongfully withheld documents.

**1. Mr. White Is Entitled To Additional Records And Penalties For The First Request**

As was noted above, the PRA includes an exemption allowing agencies to redact or withhold investigative records when their non-disclosure is "essential to effective law enforcement." RCW 42.56.240(1). When confronting one very narrow set of circumstances, in "open and active police investigations," Washington's courts have found this exemption to be categorical in nature, meaning that whole investigative files may be withheld in their entirety. *Newman v. King Cnty.*, 133 Wn. 2d 565, 574, 947 P.2d 712, 716 (1997). Of course, the exemption cannot be applied categorically for investigations that no longer remain open and active. *See Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 476, 987 P.2d 620 (1999); *Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 385, 314 P.3d 1093, 1097 (2013).

For the purposes of determining whether an investigation is open and active, the Washington Supreme Court adopted the approach used by

the Federal Courts. *Newman*, 133 Wn. 2d at 573. Courts are directed to make a determination by examining “whether resources are allocated to the investigation” and “whether enforcement proceeding are contemplated.” *Id.* (citing *Dickerson v. Department of Justice*, 992 F.2d 1426, 1431-32 (6th Cir.1993)). If the investigation is no longer actively continuing, an agency has “the burden to parse the individual documents and prove to the trial court why nondisclosure was essential to effective law enforcement.” *Sargent*, 179 Wn. 2d at 390.

Here, on July 2, 2012, City of Lakewood falsely claimed the categorical open and active investigation exemption in order to support its withholding of requested documents for Mr. White’s first attempt to get records. CP 68, 108. The investigation was no longer active when this exemption was claimed. At that time, the investigation had been dormant for over a month. CP 161. The assigned detective had not done any additional investigation since writing up his report on the execution of the search warrants in late May, and was not contemplating any additional investigatory actions. CP 161. That detective had left the Department and no new detective was assigned -- thus no new resources were devoted, as the Department was clearly not contemplating additional action on the case. No other exemption was claimed, and the records requested should have been disclosed.

Accordingly, the trial court should have ordered the City to produce the outstanding records for this request and should have imposed daily penalties for their withholding in response to the first request. RCW 42.56.550(4).

**2. Mr. White Is Entitled To Additional Records And Penalties For The Second Request**

The silent withholding of requested records is among the cardinal sins that the PRA “clearly and emphatically prohibits.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn. 2d 243, 270-71, 884 P.2d 592, 607-08 (1994). The silent withholding of records is especially concerning to the courts because it “gives requesters the misleading impression that all documents relevant to the request have been disclosed” and impedes the requesters’ ability to challenge an agency’s withholding by preventing adequate judicial review. *Id.*

With regard to Mr. White’s second request, the City of Lakewood provided ten pages of police reports as its total production of records in response to a broad request seeking “any documents pertaining to search warrant for the property at 5314 San Francisco Ave SW #1,” lists or inventory of items recovered, as well as “emails/communications/reports pertaining to the search of 5314 San Francisco Ave SW #1.” CP 74-84, 305. The City did not include any exemption log for the search warrants, any complaints/affidavits for the search warrants, returns of service, any

property reports, any emails to other law enforcement resources, any reports of the alleged CI purchases of drugs, any CI information cards, CI files, communication records, computer aided dispatch logs, or paper investigative files that it wrongfully chose not to provide. *Id.* These records are all responsive to Mr. White's second request. Most of them were not provided until they were discovered in the course of this litigation. To date, the City continues to wrongfully and silently withhold the CI information card, CI file, communication records, computer aided dispatch logs, and paper investigative file. CP 38.

As this second request was not time-barred, the trial court should have granted Mr. White's motion with regard to this request. Because the City wrongfully and silently withheld the search warrants, complaints/affidavits for the search warrants, returns of service, property reports, emails to other law enforcement resources, and reports of the alleged CI purchases of drugs for over a year, the City is liable for daily penalties for each of these records from the date they were requested through the date they were actually provided. RCW 42.56.550(4).

For the CI information card, CI file, communication records, computer aided dispatch logs, and paper investigative file that the City has continued to withhold, Mr. White was entitled to an order compelling their production, and the City was liable for daily penalties for each of these

records, from the date of request through any future date on which they are actually provided.

As this Court stands in the shoes of the trial court, it should now order the production of the remaining outstanding records and imposition of penalties consistent with the PRA, where the trial court failed to do. See *Koenig v. Thurston County*, 175 Wn.2d 837, 842, 287 P.3d 523 (2012), citing *Progressive Animal Welfare Society (PAWS II) v. University of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

**D. The Trial Court Abused Its Discretion in Imposing a \$10 Per Day Penalty for the Third Request.**

Through many years of litigation, the Washington Supreme Court has established a guide for trial courts tasked with assessing PRA penalties. *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 466-68, 229 P.3d 735, 747-48 (2010) (hereinafter *Yousoufian 2010*). Trial court awards of penalties are generally reviewed for abuse of discretion, and trial courts abuse their discretion when they fail to consider all of the factors in the *Yousoufian 2010* framework, or act in a way that is manifestly unreasonable or based on untenable grounds or reasons. *Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 397-98, 314 P.3d 1093, 1102-03 (2013); *Yousoufian 2010*, 168 Wn.2d at 458; *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200, 1214 (2012). The trial

court abused its discretion in setting a \$10 per day penalty for the City's violations with regard to the third request.

**1. The Trial Court Erred By Failing To Analyze All Of The *Yousoufian 2010* Factors**

In *Yousoufian 2010*, the Court reestablished a 16-factor non-exclusive guide of mitigating and aggravating factors to be used by trial courts in assessing PRA penalties. 168 Wn.2d at 467. The Court established the following mitigating factors:

1. A lack of clarity in the PRA request;
2. The agency's prompt response or legitimate follow-up inquiry for clarification;
3. The agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;
4. Proper training and supervision of the agency's personnel;
5. The reasonableness of any explanation for noncompliance by the agency;
6. The helpfulness of the agency to the requestor; and
7. The existence of agency systems to track and retrieve public records.

*Id.* at 467-68. The Court established the following aggravating factors:

1. A delayed response of the agency, especially where time is of the essence;
2. Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;
3. Lack of proper training and supervision of the agency's personnel;
4. Unreasonableness of any explanation for noncompliance by the agency;
5. Negligent, reckless, wanton, bad faith, or intentional non-compliance by the agency;
6. Agency dishonesty;

7. The public importance of the issue to which the request is related, where the importance was foreseeable to the agency;
8. Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and
9. A penalty amount necessary to deter future misconduct by the agency, considering the size of the agency and the facts of the case.

*Id.* The trial court here failed to properly analyze the above factors in setting the penalty amount. Indeed, the court completely ignored such factors. Despite stating that it had considered the factors, the trial court failed to make any findings regarding, nor put on the record any discussion of, any of the above-listed factors, focusing solely on what it called the City's "simple neglect." RP 27. This was confirmed by the trial court's addition of language to the order in this matter, stating: "The Court views negligence as simple and not gross or egregious." CP 403. An agency's level of neglect cannot be the only factor given weight in deciding the penalty amount. *Yousoufian 2010*, 168 Wn. 2d at 461 ("a strict and singular emphasis on good faith or bad faith is inadequate to fully consider a PRA penalty determination"), citing *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 71, 151 P.3d 243, 244 (2007) *aff'd as modified*, 168 Wn. 2d 444, 229 P.3d 735 (2010); *Yousoufian v. Office of Ron Sims*, 152 Wn. 2d 421, 427, 98 P.3d 463, 466 (2004), *as amended* (Jan. 25, 2005). For example, the trial court failed to address how it

factored in Mr. White's economic loss, the lack of training for the PRA staff, or if, and how, the meager penalty would help prevent future abuses of the PRA by the City of Lakewood, a frequent PRA violator. By failing to properly examine -- indeed by completely ignoring -- the bulk of the *Yousoufian 2010* factors, the trial court abused its discretion in setting the penalty for Mr. White's third request.

**2. Given The Circumstances Of This Case, A \$10 Per Day Penalty Is Manifestly Unreasonable**

This case involves the City's unrepentant repeated failure to abide by the PRA and the continued frustration of Mr. White's attempts to get records. The City's patently false claim of the open and active investigations exemption came after Mr. White's third request for the same records, weeks after the City staff already knew that the exemption did not apply. CP 99-101, 108, 121-123. For some unknown reason, the City wrongfully, falsely claimed the exemption although it knew that no action had taken place or been contemplated in this case for over four months, that the assigned detective had resigned from the Police Department, and that no one else had been assigned to the case. *Id.* The City's persistent reliance on an exemption its staff knew to be false cannot to any reasonable person be "simple neglect."

With regard to the other factors, there were few, if any, mitigating factors present. Mr. White's requests were sufficiently clear for the City

not to request clarification. In each request, the City's initial reaction was to seek more time, so its responses were not prompt. This was even true for those requests which the City later denied, after a paltry 30-second search. The City did not demonstrate any particular good faith. This record does not support that the City attempted honest, timely and strict compliance with PRA.

The City's lack of PRA staff training<sup>5</sup> and supervision<sup>6</sup> also weigh in favor of a higher penalty, not a lesser one. No reasonable<sup>7</sup> explanation for non-compliance was provided.

The City was also not particularly helpful to Mr. White. Despite his multiple attempts to secure records, and his "this is an ongoing request" reminders, the City did nothing to assist Mr. White. Finally, the City cannot claim its liability is mitigated by the effective use or existence of any agency systems to track and retrieve public records. While systems

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<sup>5</sup> While they stated that they attended some conferences and had on the job training, none of the staff involved in deciding on the exemptions applied to these requests provided documentation of more than a few hours of training. CP 58-59, 124. A discovery request for training documents yielded only one 3 hour course for one of the 4 staff primarily involved in deciding to apply the open investigation exemption. CP 124.

<sup>6</sup>Supervision must have been lax, as the staff did not even know who held the final authority to make a decision about the application of an exemption. In response to deposition questions, the city's paralegals questioned believed that the Police Lieutenant had final authority for deciding whether the open investigation exemption was to be applied. CP 228-230, 238. In contrast, the Police Lieutenants believed the authority rested with the legal department. CP 204, 293.

<sup>7</sup> The city responded by providing declaration complaining about the City's high PRA workload. Alas, administrative inconvenience or difficulty for the agency fail as excuses for failure to comply with the PRA. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn. 2d at 535 (citing *Zink v. City of Mesa*, 140 Wn.App. at 337).

did exist, they could not have been implemented in any productive way for this final result to occur.

In contrast to the absence of mitigating factors, aggravating factors abound throughout the City's responses to these requests.

First, the response to each of these requests was initially delayed and dilatory, asking for additional time. This would not be problematic if the additional time was used to gather records, but it was not. Timing should be an aggravating factor here, when 30 days was requested and all that took place during those 30 days was a 30-second computer check that led to the false claim of an exemption.

Lack of compliance with procedural requirements was also present here. The RCW requires the protection of records after they are requested. Here, not only were records not protected, but the investigator assigned to the case was not even made aware of the request.

The City's process for applying the "open and active investigations" exemption was, at a very minimum, grossly negligent. Police administration acknowledged that a report's status in the computer system may not be updated and is frequently incorrect in its classification of a case as "active," including situations where cases remain in active status for years without any activity. CP 262-263, 276, 281. Nonetheless, the police lieutenant who decided to exercise the exemption in this case,

looked no further than this inaccurate system. CP 173-174. She did not even attempt to contact the investigator to verify the status. CP 173-174. The same police lieutenant who learned that the status was incorrect in early September, proceeded to wrongfully deny Mr. White access to the very same investigation later that same month. She ignored the notations on the request, and did not bother looking back to see the related previous requests. At that point City staff were clearly on notice that the investigation's contents should be released pursuant to the PRA. This challenges the credibility of the City's PRA process as a whole, hints at dishonesty, and is the main reason for which daily penalties for the third request should have been at the top of the available range.

The issue that Mr. White was researching is one of utmost public importance: the potential for violation of an individual's civil rights and the forced entry of police into a private home deserve the utmost concern and attention. Yet, the City could not be bothered to spare 2 minutes to send an email and check if records should be released to an experienced civil rights attorney who was investigating a civil rights claim. Additionally, the City should have been on notice that Mr. White might suffer economic harm, through the loss of a client, if not provided with the records he had a right to inspect under the PRA.

Finally, deterrence is an important factor to consider in this matter. The City's responses were at the very best haphazard and uncaring; at worst they displayed a stubborn obscurantism contrary to the spirit of the PRA. To this day, the City has not provided Mr. White with some of the records he requested and is entitled to. Despite this lawsuit, and many others like it, the City of Lakewood chooses not to take its responsibilities under the PRA seriously.

Given the above factors, it was manifestly unreasonable for the trial court to assign a penalty of only \$10 per day to the third request.

**E. Mr. White Is Entitled To Costs And Reasonable Attorneys Fees For This Appeal**

Mr. White is entitled to costs and reasonable attorney fees for this appeal and he respectfully requests an award of attorneys fees pursuant to RAP 18.1. The PRA provides for an award of reasonable attorney fees to:

4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a shall be including reasonable attorney fees, awarded all costs, incurred in connection with such legal action.

RCW 42.56.550. This provision includes awards of attorney fees on appeal. See *Progressive Animal Welfare Soc'y v. UW*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

## V. CONCLUSION

For the foregoing reasons, Mr. White respectfully requests this Court find the trial court erred in dismissing the claims stemming from the first two requests for records. Mr. White also seeks an order finding that the City of Lakewood violated the Public Records Act by falsely claiming the active investigations exemption, by silently withholding documents, by failing to provide the required exemption logs and by failing to protect public records for those two requests. Thus, Mr. White requests an order directing the City to immediately produce the outstanding responsive records, and ordering the City to pay the Plaintiff appropriate daily penalties for each of the categories of records wrongfully withheld from each of the requests made. With regard to the penalty amount for the thirteenth request, Mr. White requests an order from this Court correcting the

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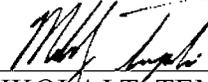
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trial court's abuse of discretion and directing the trial court to set a daily penalty amount nearer the top of the daily penalty range. Finally, Mr. White respectfully asks this Court to award costs and attorneys fees.

RESPECTFULLY SUBMITTED this 15th day of May, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have transmitted electronically to “mkaser@cityoflakewood.us,” and placed in the United States Postal Service, postage prepaid, the forgoing Brief of Appellant to the following participant:

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EXECUTED this 15th day of May, 2015, at Bellevue, WA.

  
\_\_\_\_\_  
MIKOŁAJ TEMPSKI

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